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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Sunsites-Pearce Fire District,
Plaintiff,
v.
Alex M Azar, II, et al.,
Defendants.

No. CV-19-00203-TUC-RCC

ORDER

Pending before the Court is Plaintiff’s Motion for Judgment on the Administrative Record. (Doc. 22) and Defendant’s Cross-Motion (Doc. 24). Upon review, the Court will grant Plaintiff’s motion in part and deny Defendant’s motion in part.

I. FACTUAL AND PROCEDURAL SUMMARY

a. Chief Steinberg’s Participation in Diversion

Sunsites-Pearce Fire District (“District”) runs an ambulance service in and around Pearce, Arizona. AR 722. The District appointed Joshua Steinberg as Fire Chief on March 4, 2013. AR 487 at ¶¶3-4. Prior to his appointment, Chief Steinberg was charged in Cochise County with a Class 6 felony; disorderly conduct for “recklessly handl[ing] and discharg[ing] a Ruger semi-automatic handgun in the presence of his former girlfriend.” AR 825. Subsequently, the county court granted the government’s motion to suspend Steinberg’s prosecution until completion of the Cochise County Adult Diversion

1 Program. AR 832-834. Once Steinberg completed diversion, the court granted the
2 government's motion to dismiss the charges with prejudice. AR 834-37.

3 *b. District's Medicare Re-Enrollment Application*

4 To receive repayment for ambulance services that the District provided to
5 Medicare recipients, the District submitted a Form CMS-855B Medicare Re-Enrollment
6 Application ("Application") on May 30, 2013. AR 496-97; AR 670-671. The Application
7 listed Chief Steinberg as its managing employee. *Id.* Noridian Healthcare Solutions¹
8 reviewed the Application and informed the District on July 9, July 13, and November 19,
9 2013 that it needed to resubmit the Application, this time listing Chief Steinberg as the
10 director/officer. AR 502-03, 676-79, 697, 702. Noridian also requested the District
11 provide a Final Adverse Legal Action History Form for Chief Steinberg. AR 503.

12 The District submitted another Application on November 21, 2013, listing Chief
13 Steinberg as director/officer. AR 510-512. In this submission, Steinberg indicated that he
14 had no final adverse legal actions imposed against him. AR 510-511, 705.

15 On January 14, 2014, the Centers for Medicare & Medicaid Services ("CMS")
16 approved the District's Application. AR 649. In 2016, the District submitted a
17 Revalidation Application. AR 714-63. The Revalidation Application updated the
18 District's information, but again did not report Steinberg's diversion as an adverse legal
19 action. AR 659, 740. The District participated in the Medicare program from the date of
20 approval until March 31, 2017. At that time, Noridian notified the District that its
21 Medicare privileges had been revoked because it had made false or misleading statements
22 regarding Chief Steinberg's legal troubles. AR 489, 520-21. The revocation was
23 retroactive to March 4, 2013—the date Chief Steinberg was hired. *See* AR 520.

24 *c. Request for Reconsideration from CMS*

25 The District requested reconsideration of Noridian's decision on April 26, 2017.
26 AR 522-23, 654-55. The District argued its Application was not misleading; rather, the
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28 ¹ Noridian is a contractor for CMS that determines eligibility for Medicare payments under the authority
of 42 U.S.C. § 1395ddd(a)-(b). AR 2.

2013 version of the regulations² were insufficient to put the District on notice that it needed to disclose Chief Steinberg’s participation in diversion. AR 522, 654. Prior to a 2015 change in the regulations, the District argued, “conviction” did not include pretrial diversion programs such as the one in which Chief Steinberg participated. AR 522, 654.

When CMS denied reconsideration on July 24, 2017, it evaluated the decision under the regulations in effect at the time of the 2017 revocation—meaning, the 2015 version. AR 659-60; 42 C.F.R. § 1001.2. Because the 2015 version included pretrial diversions and deferred adjudications, CMS found that Chief Steinberg’s participation in

² In 2013, when the revised Application was first submitted, the regulations permitted revocation of a supplier’s billing privileges when:

. . . The *provider, supplier, or any owner of the provider or supplier*, within the 10 years preceding enrollment or revalidation of enrollment, was convicted of a Federal or State felony offense that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries.

(i) Offenses include—

(A) Felony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted, *including guilty pleas and adjudicated pretrial diversions*.

42 C.F.R. § 24.535(a)(3) (2013) (emphasis added). In contrast, the 2015 version of the regulation elucidated what constituted a revocable offense and modified which individuals needed to disclose prior convictions. The regulation states revocation may occur when:

. . . The provider, supplier, or any owner *or managing employee* of the provider or supplier was, within the preceding 10 years, convicted (*as that term is defined in 42 C.F.R. 1001.2*) of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.

(ii) Offenses include, *but are not limited in scope or severity to—*

(A) Felony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted, including guilty pleas and *adjudicated pretrial diversions*.

42 C.F.R. § 424.535(a)(3)(i) (2015) (emphasis added). The term “convicted,” as defined under 42 C.F.R. § 1001.2(d), encompasses “[a]n individual or entity [who] has entered into participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld.” *Id.*

1 the Adult Diversion Program constituted a “conviction.” AR 660. Therefore, CMS
2 concluded, the District and Steinberg’s failure to disclose his conviction on either the
3 2013 Application or 2016 Revalidation Application was misleading and justified
4 revocation. AR 661.

5 Moreover, CMS stated revocation was appropriate because Steinberg’s firing of a
6 weapon in another’s presence was similar to assault and could be considered a per se
7 “detrimental” action under the regulations.³ AR 660. Even if not considered detrimental
8 per se, the charged conduct was detrimental because “[b]y recklessly handling and
9 discharging a deadly weapon . . . Mr. Steinberg risked the safety and well-being of a
10 former girlfriend.” *Id.* This disregard for the safety of others could translate to Medicare
11 beneficiaries and threatened the safety of the Medicare program. *Id.*

12 Next, the District argued that since Chief Steinberg was not considered
13 “convicted” under *state* law, an affirmative response to the Application question was
14 unnecessary. AR 522, 654. However, CMS determined the state law categorization was
15 inconsequential, for it was federal law’s definition of “conviction” that applied. AR 660.

16 Finally, the District claimed it had since removed Chief Steinberg from his
17 Medicare duties, therefore its Medicare billing privileges should be reinstated. *Id.*; AR
18 558. But CMS decided there was insufficient evidence that the District had “terminated
19 its business relationship” with Steinberg as necessary under 42 C.F.R. § 424.535(e).⁴ AR
20 661. Although the District removed Chief Steinberg from contact with the Medicare
21 Program, he was still “listed as a managing employee and authorized official for [the
22 District].” AR 661; *see* AR 844. So, CMS refused to rescind the termination. AR 661.

23 *d. ALJ Review*

24 The District then sought review from an Administrative Law Judge (“ALJ”). AR
25 22-30. The District argued that CMS erroneously applied the 2015 definition of

26 ³ Termination may occur under 42 C.F.R. § 42.535(a)(3)(i)-(ii) for felony offenses such as assault and
27 “other similar crimes for which the individual was convicted” if CMS determines that the crime is
28 “detrimental to the best interests of the Medicare program and its beneficiaries.”

⁴ Section 424.535(e) provides that Medicare revocation may be reneged if the revocation “was due to
adverse [felony conviction] against an owner, managing employee, or an authorized or delegated official”
and if the “supplier terminates and submits proof that it has terminated its business relationship with that
individual within 30 days of the revocation notification.”

1 “conviction,” which expanded the term to include deferred adjudication programs
2 wherein a conviction was withheld. AR 26. Since the original Application was filed in
3 2013, the District asserted it should not be held to the expanded 2015 definition. *Id.*

4 However, even under the 2015 regulation, the District claimed that Steinberg did
5 not have a “conviction.” *Id.* For a “conviction,” the regulation requires an “adjudicated”
6 pretrial diversion, but does not define “adjudicated,” the District stated. *Id.* The dictionary
7 definition of “adjudication,” the District claimed, is “a judicial decision or sentence.” *Id.*
8 Therefore, convictions based on adjudicated pretrial diversions should be confined to
9 instances in which a defendant has either been convicted or pleaded guilty (which
10 constitutes a judicial decision of guilt) and then was given diversion. *Id.* Because there
11 was no judicial decision about guilt and no sentence here, Steinberg’s pretrial diversion
12 did not qualify as a “conviction” and the District did not need to report it. *Id.*

13 Furthermore, the District contended that CMS should not have found Steinberg’s
14 actions were “detrimental to the Medicare program and its beneficiaries” because
15 Steinberg’s actions differed from the enumerated acts deemed “detrimental.” AR 28.

16 Finally, the District again insisted that CMS should not have concluded that the
17 District failed to terminate its relationship with Steinberg because it submitted evidence
18 of Steinberg’s removal from all Medicare duties. AR 29.

19 The ALJ granted summary judgment in favor of CMS. AR 1-6. The ALJ found
20 that Chief Steinberg’s participation in diversion was a “conviction” because both versions
21 of the regulation included an “adjudicated pretrial diversion.” AR 3-4. The ALJ found
22 that, in this instance, “adjudication” “is synonymous with ‘disposition.’” AR 4. The ALJ
23 noted that the court disposed of this matter by dismissing the charges upon completion of
24 diversion. *Id.*

25 Moreover, The ALJ found the District’s argument that “adjudicated pretrial
26 diversion” must mean diversion that occurs only subsequent to a guilty determination or
27 conviction was incorrect because it completely overlooked the word “pretrial.” *Id.*

28 Next, the ALJ concluded that it was within CMS’s discretion to resolve whether
an action was detrimental and subject to revocation of Medicare benefits. AR 4-5. CMS,

1 the ALJ stated, was not limited by the enumerated grounds for revocation stated in the
2 regulations and had the ability to define other similar offenses as detrimental. *Id.*
3 Regardless, the ALJ noted he would not reassess CMS's decision because CMS enjoyed
4 "a non-reviewable discretionary authority vested in CMS by the Secretary." AR 5 (citing
5 *Letantia Bussell*, DAB No. 2196 (2008)).

6 Finally, the ALJ determined it was not error for CMS to refuse to reinstate
7 Medicare billing benefits even though the District removed Steinberg from his Medicare
8 duties because it did not terminate him entirely. *Id.* The ALJ stated it was unclear how
9 Chief Steinberg's duties as fire chief would prevent him from managing the ambulance
10 service. *Id.*

11 *e. Departmental Appeals Board's Review*

12 The District then appealed the ALJ's decision to the Departmental Appeals Board
13 ("DAB"). AR 427. The District again contended that the ALJ erroneously applied the
14 2015 regulations. AR 455-56. This led to an incorrect determination that Steinberg's
15 diversion constituted a "conviction" because it was an "adjudicated pretrial diversion."
16 AR 458-460.

17 Here, the District added that termination was inappropriate because Steinberg was
18 a managing operator, and managing operators were not added to the list of persons who
19 must disclose adverse legal actions until the 2015 amendment. AR 455-56.

20 During oral argument, the District then explained that the ALJ erred when finding
21 there was no genuine issue of material fact that the District had terminated its business
22 relationship with Steinberg. AR 860-61. The District claimed it had presented evidence
23 that representatives at Noridian assured the District that the separation of Chief Steinberg
24 from the Medicare program was sufficient to terminate the relationship in accordance
25 with the regulations. AR 861. The District further asserted that the ALJ made an
26 inappropriate credibility determination, AR 862, 875-76, and whether the Medicare
27 program in fact advised the District to "terminate" in the manner that it did raised a
28 genuine issue that could change the outcome of the revocation. AR 861-62.

The DAB upheld the ALJ's decision and stated that although application of the

1 2015 regulation was appropriate, Chief Steinberg's participation in diversion was
2 considered a "conviction" under both the 2013 and the 2015 regulations because both
3 versions included "adjudicated pretrial diversions." AR 10, 12.

4 Second, the definition of "adjudicated" includes "to settle judicially," the DAB
5 explained. AR 12-13. There was no question that Chief Steinberg's legal matter was
6 settled judicially: it was dismissed by the court upon successful completion of diversion
7 and a motion by the government. *Id.* Like the ALJ, the DAB found that the District's
8 contention that an adjudicated pretrial diversion must mean diversion after a guilty plea
9 or conviction overlooks the regulation's antecedent term, "pretrial," and would make the
10 distinction between guilty pleas and adjudicated pretrial diversions meaningless. AR 13-
11 15. The DAB pointed out that diversion programs may sometimes be run through
12 agencies outside of the court, and that these sorts of programs may not be considered
13 "adjudicated." AR 15. But, in Chief Steinberg's case, the court made all applicable
14 decisions, including resolution of the matter. *Id.* This constituted an "adjudication." *Id.*

15 The DAB understood that the 2015 amendments "expand[ed] the application of
16 the basis for revocation from felony convictions of the supplier itself and its owners to
17 also include 'managing employees.' *Id.* However, the DAB found this distinction was
18 immaterial because revocation can also occur when a supplier provides false or
19 misleading information. AR 16. Captain Steinberg certified that he personally had not
20 been subject to any final adverse legal actions. *Id.* Therefore, the Application provided
21 misleading information—a proper basis for revocation. *Id.*

22 Finally, the DAB determined that it was within the ALJ's discretion to revoke the
23 District's Medicare participation by finding Chief Steinberg's conviction was detrimental
24 to the Medicare program. AR 16-17. The DAB stated that Captain Steinberg's offense
25 endangered the safety of others and the ALJ's determination that these actions were
26 similar to assault and therefore detrimental under Section 424.535(a)(3)(ii)(A) was
27 reasonable. AR 17. But, even if the DAB had disagreed with the result, it noted the ALJ
28 had discretion to decide what constituted a detrimental action. *Id.*

While the DAB conceded there was a factual dispute about whether the removal

1 had the functional effect of removing Captain Steinberg from his Medicare duties, it
 2 noted this issue did not raise a genuine issue of material fact because the regulation did
 3 not permit “simply fencing off the convicted persons from involvement in Medicare
 4 matters.” AR 21.

5 Finally, the DAB stated reinstating billing benefits was discretionary, so CMS’s
 6 denial was within that discretion. AR 19-20.

7 *f. District Court Appeal*

8 The District now appeals the DAB decision to this Court, arguing that the DAB:
 9 (1) erroneously determined Steinberg’s participation in diversion was a “conviction” and
 10 was “adjudicated”; (2) wrongly decided that it was prohibited from reviewing the ALJ’s
 11 decision that Steinberg’s actions were “detrimental” to the Medicare Program and its
 12 beneficiaries; (3) failed to consider that prior to the 2015 revision, a managing
 13 employee’s felony conviction could not provide a reason for revocation; and (4)
 14 improperly determined that there was no genuine issue of material fact over whether the
 15 District had “terminated” its relationship with Chief Steinberg. (Doc. 22.)

16 **II. STANDARD OF REVIEW**

17 *a. Medicare Program*

18 The Medicare Act allows reimbursement to providers and suppliers of healthcare
 19 services to Medicare participants. 42 U.S.C. §§ 1395-1395ccc. Ambulance services
 20 provided by entities such as Plaintiff Sunsites-Pearce Fire District are considered
 21 “suppliers” under federal regulations. *See* 42 U.S.C. § 1395x(d); AR 8, n.2.

22 When properly enrolled, a supplier can file for and receive payments for the
 23 services it provides to Medicare recipients. 42 C.F.R. § 424.505. The Centers for
 24 Medicare & Medicaid Services (“CMS”)—the entity that administers the Medicare
 25 program—entrusts the review of suppliers’ applications for Medicare billing eligibility to
 26 certain contractors; in this case, Noridian. *See* 42 U.S.C. § 1395ddd(a)-(b). Initial and
 27 continuing eligibility for payments is dependent upon honest responses to the Medicare
 28 Enrollment Application; billing privileges may be revoked if a supplier provides
 misleading information. 42 C.F.R. § 424.535(a)(4). In addition, CMS may revoke a

1 supplier's billing privileges if a provider, owner, or managing employee of a supplier has
 2 been convicted of a felony that CMS decides is detrimental to the Medicare program
 3 within ten years prior to a Medicare Application. 42 C.F.R. § 424.535(a)(3) (2015); *see*
 4 *also* 42 U.S.C. § 1395u(h)(8); 42 U.S.C. § 1395cc(b)(2)(D).

5 *b. Administrative Exhaustion*

6 Before the district court may review a revocation of Medicare billing privileges, a
 7 supplier must first make a request to CMS for reconsideration. 42 C.F.R. §§ 498.5(l);
 8 498.22(a). If reconsideration is not in the supplier's favor, the supplier can ask for de
 9 novo review by an Administrative Law Judge ("ALJ"). 42 C.F.R. § 498.40. A supplier
 10 may then appeal the ALJ's decision to the Departmental Appeals Board ("DAB"). 42
 11 U.S.C. § 498.80. The DAB's decision is considered the Secretary's final decision for the
 12 purposes of judicial review. *See* 42 C.F.R. §§ 498.90(a)(1), 498.5(f)(2). The district court
 13 may then consider an appeal of the final decision of the Secretary "in the same manner as
 14 is provided in 42 U.S.C. § 405(g)," the statute guiding judicial review of Social Security
 15 claims. *Heckler v. Ringer*, 466 U.S. 602, 605 (1984); 42 U.S.C. § 405(g); 42 U.S.C. §
 16 1395cc(h)(1)(A).

17 Upon review, the district court is bestowed with the "power to enter . . . a
 18 judgment affirming, modifying, or reversing the decision of the [Secretary], with or
 19 without remanding the cause for a rehearing." 42 U.S.C. § 405(g). The Court reviews an
 20 agency's decision to determine whether such decision was "arbitrary, capricious, an
 21 abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

22 "An agency's interpretation [of its own regulations] must be given controlling
 23 weight" and "substantial deference" "unless it is plainly erroneous or inconsistent with
 24 the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 506 (1994) (quotation
 25 marks omitted). Moreover, the District Courts "must defer to the Secretary's
 26 interpretation unless an 'alternative reading is compelled by the regulation's plain
 27 language or by other indications of the Secretary's intent at the time of the regulation's
 28 promulgation.'" *Id.* at 512 (quoting *Gardenbring v. Jenkins*, 485 U.S. 415, 430 (1988)).
 Furthermore, "[w]hen the meaning of regulatory language is ambiguous, the agency's

1 interpretation of the regulation controls ‘so long as it is ‘reasonable,’ that is, so long as
2 the interpretation sensibly conforms to the purpose and wording of the regulations.’” *Or.*
3 *Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1131 (9th Cir. 2003)
4 (quoting *Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144,
5 150–51 (1991) (internal quotation marks omitted).

6 **III. DISCUSSION**

7 *a. Whether CMS Could Revoke the District’s Billing Privileges When Chief* 8 *Steinberg was Merely a Managing Employee?*

9 The District argues that the DAB erroneously affirmed CMS’s revocation because
10 Chief Steinberg’s diversion was not subject to disclosure. (Doc. 22 at 13-14.) Steinberg
11 was merely a managing employee, the District explains, and managing employees were
12 not required to indicate prior convictions under the 2013 regulations; only a provider,
13 supplier, or any owner of the provider or supplier need do so. *Id.*

14 However, the DAB properly affirmed CMS’ decision because the District was
15 subject to revocation under either the 2015 or 2013 regulatory language for providing a
16 false statement. AR 16; *see* 42 C.F.R. §§ 424.535(a)(4). The Application question asked
17 whether “*this individual* in Section 6A above [i.e. Steinberg], under any current or former
18 name or business identity, ever had a final adverse legal action listed on [Section 3] of
19 this application *imposed against him . . . ?*” AR 705 (emphasis added). Chief Steinberg
20 marked “NO,” and therefore certified that he had not *personally* received any convictions
21 as defined in Section 3.

22 The District contends that Steinberg did not provide misleading information
23 because Section 3 does not state that managing employees must disclose a conviction,
24 only providers, suppliers, and their owners. (Doc. 22 at 13-14.) However, Section 3 is
25 referenced in this portion of the Application to provide the definition of “conviction,” not
26 for the identity of those who must disclose such convictions. Steinberg was asked directly
27 if he had prior felony convictions. To read the question in the manner the District asserts
28 would make the question posed directly to Steinberg duplicative.

1 The DAB explained that whether Steinberg was a managing employee was
 2 immaterial because he provided a false statement. Conditionally, this explanation is
 3 reasonable only if Steinberg's participation in the Adult Diversion Program also
 4 constituted a "conviction" that he failed to disclose. For the reasons set forth below, the
 5 Court finds that it does.

6 *b. Whether the DAB erred when it found that Steinberg's participation*
 7 *in the diversion program was a "conviction"?*

8 The District argues that in 2013, the regulations did not define "conviction,"
 9 therefore the word should take on the ordinary meaning. (Doc. 22 at 9.) The District
 10 states that the Merriam-Webster Dictionary definition of conviction is to "find or prove to
 11 be guilty." (*Id.*) Likewise, Black's Law Dictionary defines the term as "[t]he act or
 12 process of judicially finding someone guilty of a crime; the state of having been proved
 13 guilty"). (*Id.*) Since there was no finding of guilt in this matter, the District claims that
 14 Steinberg could not have been "convicted" and Medicare billing privileges should not
 15 have been revoked. (*Id.* at 10.)

16 The DAB decided that it was irrelevant which version of the regulations it used;
 17 both versions included an "adjudicated pretrial diversion" as a "conviction" subject to
 18 disclosure. AR 12. The Court concludes that the DAB's interpretation is reasonable and
 19 not inconsistent with either version of the regulation. No matter how "conviction" is
 20 otherwise defined, at minimum it includes "adjudicated pretrial diversion." This inclusion
 21 negates any need for the Court to further analyze the term "conviction" because, since
 22 Steinberg's participation in the Cochise County Adult Diversion Program qualifies as an
 23 "adjudicated pretrial diversion," it is considered a "conviction" under the regulations.

24 *c. Whether the DAB erred when it found that Steinberg's participation*
 25 *in the diversion program was an "adjudicated pretrial diversion"?*

26 The District next claims that the DAB should have used the ordinary meaning of
 27 "adjudicated" when deciding whether Steinberg's diversion was an "adjudicated pretrial
 28 diversion" and therefore a conviction. (Doc. 22 at 10.) Under the plain meaning, it
 argues, "adjudicated" requires a decision about who is right-i.e. a decision on the merits.

1 (*Id.*) Since there was no determination of guilt, but rather a dismissal, the matter was not
2 adjudicated and cannot be considered a conviction. (*Id.*)

3 The Court first looks to the legal dictionary definition for guidance. Black's Law
4 Dictionary defines adjudicate as: "1. To rule on judicially. 2. Adjudge." Black's Law
5 Dictionary (11th ed. 2019). Adjudication is defined as: "1. The legal process of resolving
6 a dispute; the process of judicially deciding a case. 2. [J]udgment." *Id.* Moreover,
7 Black's explains that a judgment occurs when a court makes a "final determination of the
8 rights and obligations of the parties in a case." *Id.* Similarly, Merriam-Webster explains
9 adjudicate means "to make an official decision about who is right in (a dispute): to settle
10 judicially." Merriam-Webster Dictionary, [https://www.merriam-](https://www.merriam-webster.com/dictionary/adjudicate)
11 [webster.com/dictionary/adjudicate](https://www.merriam-webster.com/dictionary/adjudicate) (last visited June 17, 2020). Both the legal and the
12 layman definition allow for an adjudication to occur in two instances: when a case or
13 dispute is settled through judicial means, and when there is a determination of guilt or
14 liability. It was reasonable for the DAB to decide that Steinberg's participation in
15 diversion had been "adjudicated," because the DAB used the former definition. The DAB
16 found the judge resolved the case by dismissing with prejudice; and this resolution was
17 judicial because a court order disposed of the matter. To find that an "adjudication" must
18 include a determination of the merits both ignores the former definition of the word and
19 would render the phrase "adjudication on the merits" superfluous. The Court gives
20 deference to the DAB's interpretation of the word "adjudicate" because it was not plainly
21 erroneous or inconsistent with the regulation.

22 Next, the District argues that a "conviction" requires a determination of guilt;
23 therefore, the regulation should be interpreted as finding that an "adjudicated pretrial
24 diversion" can occur only when there is a guilty plea or a conviction with subsequent
25 diversion participation. (Doc. 22 at 11.)

26 The Court is not persuaded. First, the regulation clearly considers an "adjudicated
27 pretrial diversion" a "conviction," regardless of the plain meaning of the term conviction.
28 Second, as demonstrated in the dictionary definition, an "adjudication" does not require a
decision on the merits, but merely a judicial resolution. The DAB's finding that the

1 judge's dismissal with prejudice adjudicated the matter aligns with the plain meaning of
 2 the term adjudicate and does not conflict with the regulation. Third, although the District
 3 has pointed to cases showing that diversion participation after a guilty plea or conviction
 4 both constitute "adjudicated pretrial diversions" under the regulation, the District has not
 5 shown these are the only instances that qualify. The Court agrees with the DAB that
 6 viewing the regulation in the manner the District asserts renders the term "pretrial"
 7 superfluous. *See* AR 11. The DAB's interpretation of its regulation was consistent with
 8 the plain meaning and the intent of the regulation. In sum, Steinberg's participation in the
 9 Cochise County Adult Diversion Program was reasonably considered an "adjudicated
 10 pretrial diversion" and also a "conviction" subject to disclosure. Correspondingly, the
 11 DAB's conclusion to the same was not arbitrary or capricious.

12 *d. Whether it was error for the DAB to refuse to review the ALJ's*
 13 *determination that Chief Steinberg's actions were "detrimental to*
 14 *the Medicare program and its beneficiaries"?*

15 The District claims the ALJ erroneously determined it could not review CMS's
 16 decision that Steinberg's actions were detrimental. (Doc. 22 at 12.)

17 CMS explained that there were certain enumerated offenses that were per se
 18 detrimental, such as assault. AR 611. Steinberg's disorderly conduct was also per se
 19 detrimental as it was similar to assault "because the crime involved the reckless use of a
 20 handgun in the presence of a person." *Id.* Alternatively, CMS found the actions were
 21 detrimental because discharging a deadly weapon put Steinberg's former girlfriend in
 22 danger, and his actions "call[] into question [Steinberg's] moral turpitude." *Id.* This risky
 23 behavior could translate to his work environment, and place Medicare beneficiaries at
 24 risk. *Id.*

25 Upon reconsideration, The ALJ concluded that CMS's determination of a
 26 detrimental action was non-reviewable. AR 5. Nonetheless, ALJ also noted that it is
 27 within CMS's discretion to decide which actions were detrimental and CMS was not
 28 limited by the per se definition. AR 611.

The DAB found that Steinberg's reckless use of a firearm, as illustrated in the

1 charging document, showed how he had endangered the safety of others. AR 17. This, the
2 DAB concluded, was similar to an assault, but even if it were not considered a per se
3 offense, CMS had discretion to find the disorderly conduct detrimental. *Id.* Logically, the
4 DAB found it was detrimental because Steinberg had demonstrated that he was capable
5 of placing others at risk of harm. AR 17-18.

6 The Court cannot find the DAB's conclusions are unreasonable, arbitrary, or
7 capricious. Section 424.535(a)(3)(ii)(A) lists crimes that are per se detrimental to the
8 Medicare program but also includes crimes "similar to" those enumerated offenses. The
9 Federal Regulations expressed an intent to allow CMS broad discretion when
10 determining which acts are detrimental. 71 Fed. Reg. 20,760 (CMS has authority to
11 determine which acts are "detrimental" and in doing so can "consider the severity of the
12 underlying offense."). It is true that Steinberg's disorderly conduct was not identical to
13 the enumerated offenses, but the DAB logically concluded that "recklessly handling,
14 displaying or discharging a deadly weapon" in the presence of another was a similar
15 offense that, if repeated, would put Medicare beneficiaries in harm's way.

16 Moreover, the DAB did not merely concede the ALJ's opinion without review; it
17 noted that the ALJ's decision was "in no way arbitrary and capricious, to determine that
18 [Mr. Steinberg's] particular criminal conduct would make his participation detrimental to
19 the Medicare program and its beneficiaries." AR 18. Even if, *arguendo*, the ALJ erred
20 when finding it could not review CMS' determination, that error is harmless because the
21 DAB suitably found that CMS' decision was reasonable and supported by substantial
22 evidence in the record.

23 *e. Whether Summary Judgment was appropriate?*

24 The District argues that a genuine issue of material fact remained as to whether it
25 had sufficiently "terminated its business relationship" with Chief Steinberg, and the ALJ
26 inappropriately granted summary judgment. (Doc. 22 at 15-16.) Furthermore, the District
27 claims that the DAB expanded the meaning of the word "termination;" adding the
28 requirement that the District terminate the "entire" business relationship. *Id.* This was far
too expansive, and the District argues it should have been provided the opportunity to

1 demonstrate how it effectively terminated Steinberg by eliminating all of Steinberg's
2 duties related to Medicare. *Id.*

3 Summary judgement is proper if the pleadings and supporting documents, viewed
4 in the light most favorable to the non-moving party, "show that there is no genuine issue
5 as to any material fact and that the moving party is entitled to judgment as a matter of
6 law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A
7 material fact is one "that might affect the outcome of the suit under the governing law.
8 Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v.*
9 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

10 Dismissing the District's claims, the ALJ stated:

11 [The District] argues that its 2017 termination of Mr. Steinberg's Medicare
12 supervisory authority effectively wiped the slate clean, requiring the
13 contractor to reinstate Petitioner as of that date. As support for this
14 contention Petitioner cites an April 26, 2017 resolution by the fire district
15 board that purports to separate Mr. Steinberg from all Medicare issues.
16 However, *neither this resolution nor the supporting testimony offered by*
17 *Petitioner explains precisely how this arrangement is supposed to work.*
18 Mr. Steinberg retains his duties as fire chief. The ambulance service is part
19 of the district's fire department. Petitioner has provided no mechanism that
20 separates the operation of the ambulance service and associated emergency
21 medical services from the fire department. I find that the contractor had
22 discretion to decline to renew given the vagueness of the resolution and the
23 absence of an explanation as to how Mr. Steinberg would serve as fire chief
24 but not manager of the fire department's ambulance service.

25 AR 5 (internal citations omitted) (emphasis added).

26 The ALJ, however, appears to have failed to consider the District's evidence that it
27 acted upon Noridian's advice, which indicated that bifurcating Chief Steinberg's duties
28 would be an effective way to terminate the business relationship and to have its billing

1 privileges reinstated.⁵ In fact, in the ALJ's introduction, he expressly declined to consider
2 the District's evidence, stating, "I decide this case based on the undisputed material facts.
3 However, I refer to some of the parties' exhibits, only for purposes of illustrating facts
4 that are not in dispute." AR 1.

5 Whether the District was advised by CMS's contracting agent to proceed exactly
6 in the manner that it did was a disputed fact, and was material to whether Noridian's
7 determination the District failed to terminate Steinberg is consistent with CMS' own
8 directive.

9 Moreover, unlike the DAB, the ALJ's decision does not interpret the regulation as
10 prohibiting bifurcation of Steinberg for termination to occur, but rather seems to permit
11 bifurcation had the District been able to present more evidence of "how this arrangement
12 is supposed to work." This raises a factual dispute that should have precluded summary
13 judgment.

14 In contrast to the ALJ, the DAB stated that Noridian's alleged faulty advice on
15 how to successfully terminate Steinberg was immaterial to the question of whether
16 Steinberg was in fact terminated within the meaning of the regulation. AR 20. The DAB
17 explained that "[t]he regulation instead refers broadly to the 'termination' of an entire
18 'business relationship'" and any explanation about how the District successfully
19 separated Steinberg from the Medicare program was inconsequential "because the
20 language of the regulation does not appear to allow simply fencing off of the convicted
21 person from direct involvement in Medicare matter." AR 21.

22 The DAB's interpretation of the meaning of "termination" in the regulations is
23 inconsistent with Noridian's initial advice and the ALJ's permissive statement that
24 termination may be possible without complete removal from the entire business. The
25 DAB also inserts the term "entire" relationship into the regulation, something which it

26 ⁵ The District submitted the declaration of the District Board's Chairperson, AR 484-486, as well as the
27 board meeting minutes, AR 57-61, and Resolution # 17-001, AR 62, each stated that the District acted in
28 response to the advice of Noridian employees. *See also* AR 585 ¶¶ 19-20, 407, 525, 529, 764, 766, 861.
The District also provided the names, reference numbers, and dates in which it spoke to Noridian
employees and received such information. AR 55, 485. Furthermore, the District provided Chief
Steinberg's declaration, which noted that he was removed from all Medicare matters and that he no longer
reviews, approves, or responds to Medicare issues for the District. AR 489.

1 appears the ALJ and Noridian did not do. This inconsistency is unreasonable, as it
2 provides contradictory guidance to a Medicare supplier without explanation and elevates
3 the termination to beyond the business relationship between the convicted person and the
4 Medicare program, but to all related employment regardless of the connection to the
5 Medicare program. The Court, therefore, finds the ALJ and DAB's decision in this
6 respect arbitrary and capricious and inconsistent with the intent of the regulation.

7 Defendant also contends that the District's claim about Noridian is an estoppel
8 argument, and this is impermissible because there are no allegations of misconduct. (Doc.
9 27 at 8.) The Court does not construe the District's allegations in this manner. Instead, the
10 District is asserting, and the Court agrees, that the District raised a genuine issue of fact
11 precluding summary judgment: that the District was told by Noridian (a representative of
12 CMS) that it could proceed as it did, and this would terminate its business relationship.
13 The ALJ could not determine as a matter of law whether the actions did in fact terminate
14 the business relationship had the ALJ taken the alleged facts in favor of the District. Any
15 question as to the termination's effectiveness was a factual issue that precluded summary
16 judgment. In turn, the DAB's affirmation of the ALJ's conclusions was also in error.

17 Instead, the ALJ granted summary judgment, and the Court finds this constituted
18 an error of law. The ALJ allowed that there could be a way to effectively terminate
19 Steinberg through bifurcation. Although there was evidentiary support in the form of
20 declarations by persons with first-hand knowledge, the ALJ decided there was
21 insufficient evidence how the termination was conducted and whether this did in fact
22 terminate the District's relationship. In sum, the ALJ suggested that there are unresolved
23 factual issues as to how termination worked and acknowledged that the District submitted
24 evidence in support of its proposition, but the ALJ did not take these allegations in the
25 light most favorable to the non-moving party. This was error.

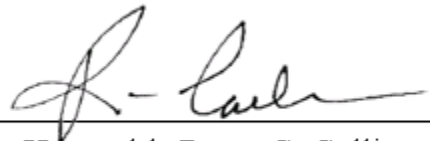
26 Finally, the Court agrees with Defendant that the decision whether to reinstate
27 billing privileges is discretionary, however, by prematurely granting summary judgment,
28 the ALJ did not reach whether the District's revocation should be withdrawn. The proper
remedy, therefore, is to remand this case to the ALJ for a limited evidentiary hearing on

1 the advice received by Noridian, how the termination worked, and a decision on whether
2 the District's billing privileges should be reinstated on this basis.

3
4 Accordingly, IT IS ORDERED:

- 5 1. Plaintiff's Motion for Judgment on the Administrative Record is
6 GRANTED IN PART. (Doc. 22.)
7 2. Defendant's Cross-Motion for Judgment on the Administrative Record is
8 DENIED IN PART. (Doc. 24.)
9 3. This matter REMANDED to the Secretary for limited reconsideration in
10 accordance with this Order.
11 4. The Clerk of Court shall docket accordingly and close the case file in this
12 matter.

13 Dated this 13th day of July, 2020.
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18 Honorable Raner C. Collins
19 Senior United States District Judge
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